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No. 03-366

Supreme Court, U.S.
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In The

# Supreme Court of the United States

NEW ORLEANS STEVEDORES AND
SIGNAL MUTUAL ADMINISTRATION LTD.,

*Petitioners,*

v.

PEGGY IBOS, Surviving Spouse of Bertrand Ibos, Jr.
and
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED STATES
DEPARTMENT OF LABOR,

*Respondents.*

**On Petition For A Writ Of Certiorari
Of The United States Court Of Appeals
For The Fifth Circuit**

## PETITIONERS' REPLY MEMORANDUM

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## LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner New Orleans Stevedores is an independent corporation. Petitioner Signal Mutual Administration Ltd. is a not-for-profit group self-insurance facility. Peggy Ibos is a claimant for benefits under the LHWCA on her own behalf and as surviving spouse of Bertrand Ibos, Jr. The Director, Office of Workers' Compensation Programs, is the administrator of the LHWCA compensation program.

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## INTRODUCTION AND SUMMARY OF ARGUMENT IN REPLY

Longshore employers and the maritime industry generally are faced with an increasingly unacceptable and emerging problem caused by the tyranny of the Cardillo Rule. *See Travelers Ins. Co. v. Cardillo*, 255 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). When the Second Circuit announced this rule almost fifty years ago, it had no obvious or even hidden intention of imposing liability on employers that are not responsible for compensible injury to the employee. Such an extraordinary principle of liability was, at the time, unheard of in American jurisprudence.

After decades of tailoring the rule to one circumstance after another, the Fifth Circuit here finally discovers a previously undisclosed absolute liability principle that has no true statutory or legislative foundation. That discovery raises the specter of liability for thousands of asbestos cancer cases for many innocent maritime employers. *See Norfolk & Western R. Co. v. Ayers*, 538 U.S. 135 (2003).

The Department of Labor's ("DOL") defense of the rule is both disappointing and unpersuasive. Clear and important disagreements in principle with other courts are dismissed as insufficiently perfect to merit the Court's review. No attempt is made to defend the Second Circuit's fifty-year-old and incorrect assumption that the capabilities of medical science to include or exclude responsible parties would remain fixed for all time. Instead, DOL relies on an illogical and historically incorrect reading of section 2(2) of the Longshore and Harbor Workers Compensation Act ("LHWCA"), 33 U.S.C. § 902(2), and a few legislative snippets offered in 1926, by the proponents of a

failed amendment that did not, in any case, directly address the matter raised here.

If the Fifth Circuit's absolute liability rule stands, longshore and other maritime employers expect a profound and inevitable economic impact as a direct consequence of liability for latent asbestos related cancers that they did not cause. This Court should ensure for now and the future that the judicially created rules that allocate this liability are maximally reasonable and fair and in keeping with the intent of Congress. The formula adopted here by the Fifth Circuit and embraced by DOL is neither fair nor reasonable, nor necessary nor in keeping with the intent of Congress.

## REPLY ARGUMENT

1. DOL denies any genuine circuit disagreements over the Fifth Circuit's absolute liability rule. That is a hard case to make and the Department does not make it. For the most part, DOL's attempts to draw relevant factual distinctions between this case and, in particular, the Ninth Circuit's holdings in *Todd Pacific Shipyards Corp. v. Director, OWCP*, 914 F.2d 1317 (9th Cir. 1990) ("*Picinich*") and *Port of Portland v. Director, OWCP*, 932 F.2d 836 (9th Cir. 1991) ("*Ronne*"), rest on inaccurate and irrelevant premises.

In *Picinich*, the last employer was excused from liability because the employee's exposure to asbestos during that employment was "minimal" and not "injurious." The Ninth Circuit held as a matter of law, not a matter of fact, that a non-injurious exposure to a harmful substance with the potential to cause the disease suffered

by the worker does not give rise to liability on the part of the last employer causing the exposure. *Picinich*, 914 F.2d at 1320 ("As the standard articulated in [*Todd Shipyards Corp. v.] Black* [717 F.2d 1280, 1284 (9th Cir. 1983)] makes clear, minimal exposure to asbestos is not sufficient to affix liability upon Todd. Rather Picinich's employment with Todd . . . must have 'exposed [him] to injurious stimuli in sufficient quantities to cause the disease [asbestos]'. . . . Because the Board applied the incorrect legal standard in its resolution of this case, its decision must be reversed.") (Citation omitted).

The record in Ibos's case proves beyond any doubt that his trivial exposures at New Orleans Stevedores' workplace did not cause and could not have caused his preexisting mesothlioma.[1] Findings to the contrary are not possible on this record and, in *Ibos*, both the Benefits Review Board and the Fifth Circuit applied a legal standard that is identical to the one rejected by the Ninth Circuit in *Picinich* and *Black*. *See* App. 6 ("Congress intended full liability to rest on the last exposing

[1] Both Ibos and the Director quibble about the quality of Ibos's exposures while employed by NOS. In fact, hardly any significant exposure was proved. Neither does the record in this case establish that Ibos's NOS exposure was in any way injurious. No medical witness testified that the NOS exposures caused any injury of any kind to Ibos. A non-physician testified that any exposure could cause immune system or cellular level injury but no such injury was diagnosed. What is most relevant here is that both the Board and the Fifth Circuit decided the case on the principle that exposure is the *only* predicate to liability, whether or not the exposure is injurious or related to the worker's disease. DOL and Ibos suggest that factual differences distinguish this case from the Ninth Circuit cases but no fair reading of the record or the proceedings here supports a conclusion that those differences are relevant.

employer, regardless of the absence of actual causal contribution by the final exposure."). The Fifth Circuit, unlike the Ninth, plainly does not accept a minimal or non-injurious exposure exception to the *Cardillo* Rule.

In *Ronne* and *Ramey v. Stevedoring Services of America,* 134 F.3d 954, 957 (9th Cir. 1998), the Ninth Circuit expresses a clear intent to affix liability only to the last employment that contributes to causing the occupational condition, not to the last employment at which any even non-injurious exposure occurred. DOL's assessment of the Ninth Circuit law and the Fifth Circuit's rejection of it is not supported by the words of the relevant opinions.

2. DOL correctly notes that decisions of the First, Second and Fourth Circuits are not precisely on point in that these courts did not exempt the last employers from liability in response to a latency or similar defense. *See e.g., Norfolk Shipbuilding & Dry Dock Corp. v. Faulk*, 228 F.3d 378, 387 (4th Cir. 2000); *Bath Iron Works v. Brown*, 194 F.3d 1, 5 (1st Cir. 1999); *American Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 65 (2d Cir. 2001). But neither do these opinions preclude a defense based upon proof of innocent or non-injurious exposures. In fact, the opinions uniformly contemplate an innocent exposure defense and that sets them apart from the views of the Fifth Circuit which shuts that door forever. *See e.g., Marinelli*, 248 F.3d at 65 (holding that the employer may rebut the exposure presumption "with substantial evidence that the alleged harmful workplace [exposures] did not cause, contribute to or aggravate the claimant's condition.")

In *Ibos*, NOS proved that exception to the last employer rule but was held liable anyway. *Ibos* and *Marinelli*

are irreconcilable on the legal principle NOS asks the Court to review.

3. DOL's interpretation of section 2(2) of the Act is implausible and inconsistent with the ordinary meaning of the words and the historical context. DOL's interpretation simply overlooks some of the history of workers' compensation laws in the United States. DOL argues that in defining "injury" to include a disease that "arises naturally out of such employment", Congress in 1926 was referring to generic longshore employment and had no intent to introduce a direct causation element into the determination of an employer's liability. DOL cites no authority for this proposition and fails to inform the Court of the substantial, if not unanimous, authority that is incompatible with DOL's view.

> The heart of every compensation act . . . is the coverage formula. Forty-three states and the Longshore and Harbor Workers' Compensation Act have adopted the entire British Compensation Act formula: injury arising out of and in the course of employment. [footnotes omitted]

*Larson's Workers' Compensation*, § 3.01-03 at 3-1 – 3-3 (Desk Ed. 2001).

> The arising out of test is primarily concerned with casual connection. . . .
>
> . . . the "arising out of" portion [is] construed to refer to causal origin and the "course of employment" portion to the time place and

> circumstances of the accident in relation to the employment.

*Id.* at 3-1, 3-3; *see also id.* § 12.01-02 at 12-1-2.[2]

DOL's theory that section 2(2) evidences no intent to place liability for injury or disease on a party that caused it, at least in part, as a result of the worker's employment with the responsible employer is historically untenable. It is directly contrary to the extensive body of law that has developed over more than a century here and in Europe concerning the meaning of the term "injury" in a workers' compensation environment. The injury for which an employer may be liable is an injury caused at least in part by a responsible employer. No different reading is consistent with the history of workers' compensation law in the United States, including the LHWCA.

The plain language of section 2(2), in light of its history, but also in keeping with the most natural reading of these words is not supportive of a liability scheme in which responsibility is imposed in the absence of some degree of causation connecting the disease to the worker's employment with the employer.

4. DOL finds legal authority to support its longshore enterprise liability interpretation of section 2(2) of the Act

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[2] DOL notes that sections 4(a) and (b) of the LHWCA impose liability on "every employer" "irrespective of fault." Brief for the Federal Respondent at 2, *quoting* 33 U.S.C. § 904(a), (b). The words also have an extensive history and their purpose is to distinguish a workers' compensation obligation from tort by eliminating both negligence and forseeability as factors that are relevant to an injured employee's rights. *Larson's, supra* § 3.06 at 3-6 – 3-7. The no fault premise does not imply that causation, time, place and circumstances are irrelevant to an employer's liability.

almost solely from the statement of one member of Congress in support of a failed amendment in 1926. Since the amendment did not propose to require a degree of direct causation as a predicate to an employer's liability, it does not even suggest that the unamended version eliminated causation from the liability inquiry. The amendment merely rejected an apportionment formula and it was not adopted. *To Provide Compensation of Employees Injured and Dependents of Employees Killed in Certain Maritime Employments: Hearings on H.R. 9498 Before the House Comm. On the Judiciary*, 69th Cong. 1st Sess. 74 (1926) (Statement of O.C. Brown).[3]

It would be difficult to imagine less persuasive legislative support for DOL's extraordinary theory. This Court repeatedly has held "[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation." *Bryan v. United States*, 524 U.S. 184, 196 (1998), *quoting Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951). "In their zeal to defeat a bill, they understandably tend to overstate its reach." *Id.*, *quoting NLRB v. Fruit Packers*, 377 U.S. 58, 66 (1964).

There is, in fact, no historical or legislative support for DOL's absolute liability theory.

5. DOL comes to rest ultimately on the premise that it simply is too difficult or too disruptive of the claims

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[3] DOL cites certain 1984 amendments to the LHWCA as further evidence of congressional acceptance of an absolute liability theory. There is no statement in the 1984 legislative record to support this argument and it gains no strength by juxtaposing words spoken in 1926, with reference to the 1984 activity. *See* Brief for Federal Respondent at 10.

process to allow an employer to prove its innocence. There is no empirical support for either notion and allowing a causation defense plainly has not disrupted state workers' compensation programs allowing this defense. *See* Petition For a Writ of Certiorari at 21 n.9. Neither is it impossible medically to present a causation defense in an appropriate case.

DOL has offered no valid reason why longshore employers must be held responsible for a worker's injury or disease arising out of employment with someone else. Neither does DOL appreciate the substantial injustice and profound economic consequences that will be caused to maritime employers in the future if liability for asbestos-related cancers is randomly assigned to an innocent last employer.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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